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SUBJECT: EU FAILS TO ADOPT COMMON RULES AGAINST
RACISM AND XENOPHOBIA

SUMMARY

1. EU Justice and Home Affairs (JHA) ministers on June 2 failed to agree on a draft piece of EU legislation intended to establish common rules against racism and xenophobia within the Union. Delegations did agree on the necessity for an EU-wide instrument requiring operators to retain telecom data to allow for the investigation, detection and pursuit of criminal offences. But work on this will only proceed on the basis of a step-by-step approach and Member States remain split on details. No decision was taken either on the establishment of a European Evidence Warrant (EEW) for obtaining objects, documents and data for use in proceedings in criminal matters. Full text of Council conclusions will be transmitted to EUR/ERA. Schengen-related, migration and other issues discussed by Interior Ministers will be reported separately. END SUMMARY.

FIGHT AGAINST RACISM AND XENOPHOBIA

2. The EU Council of Justice and Home Affairs in Luxembourg June 2 failed to make any decisive progress on developing a common area of freedom, security and justice. One illustration was the failure to agree on the draft Framework Decision aimed at setting common rules against racism and xenophobia. Luxembourg Justice Minister/Council chair Frieden said the draft, in spite of many amendments and three and a half years of internal EU consultations, definitely could not rally the required consensus. Frieden put a brave face on the failure, saying this "should not be misinterpreted. We all agree that racism goes against the fundamental values of the EU, but we have to take account of our different attitudes toward freedom of speech."

3. Frieden invoked "internal political discussions" in some Member States, and the absence of consensus regarding mutual legal assistance. Some delegations were not prepared to accept EU-defined rules on the limitation of speech (denial of the Holocaust, for instance, is not a criminal offence in all Member States). Another stumbling block was the clause requiring Member States to provide each other with legal assistance in investigating race-related crimes. Frieden concluded: "I don't see this as something very negative. It can be seen as Europe's respect for the constitutional traditions of its Member States." The upcoming British Presidency immediately served notice it was not going to pursue discussions on the proposal. Commission Vice-President Frattini told a press conference he was "seriously considering" withdrawing the piece, but reserved the right to submit another proposal at the beginning of 2006 under the Austrian Presidency.

RETENTION OF TELECOM DATA

4. Ministers were also split on a draft Framework Decision, following up on the March 2004 EU Declaration on combating terrorism, requiring providers of electronic communications services or networks to retain specified data to allow for the investigation, detection and pursuit of criminal offences. A proposal drafted by the U.K., France, Ireland and Sweden would require operators to keep for at least 12 months all data containing the source, routing, destination, time, date and duration of communications as well as the location of the telecom device used in making the call. The rules would apply to providers of fixed line services, mobiles phones, SMS (short messaging service) operators and Internet service providers,

including voice over Internet Protocol (VOIP) providers. Germany, Finland and Austria resisted the plan as too costly and pushed to limit the scope of requirements on telecom firms to retain data. They also sought to exclude unsuccessful phone-calls (when the caller could not get through) from its scope. The issue of whether the Commission has competence in this area is still being hotly debated both within the Commission and in private industry. (NOTE: For this proposal, the European Parliament is only being consulted, but for approval of a new proposal soon to be unveiled by the Commission using a different legal basis, the EP's assent would be needed. END NOTE.)

15. Frieden told reporters that "despite the problems," progress was made and that all Member States agreed "on the necessity for a data retention instrument to prevent and effectively control certain types of organized crime." He said agreement could be possible in the near future, based on a "step-by-step" approach. In a first stage, the obligation for retention would apply to fixed telephone lines and mobile telephones. As for the Internet and uncompleted calls, Member States not in a position to collect data could be granted a transitional period (still to be determined) for implementing EU rules. Frieden said Member States were willing to prevent providers from incurring costs not in proportion with the purpose of the legislation. The issue will be further discussed at the informal meeting of JHA ministers to take place in the UK in September 2005.

EUROPEAN EVIDENCE WARRANT -----

16. No decision was taken on the draft Framework Decision establishing a European Evidence Warrant (EEW) for obtaining objects, documents and data for use in proceedings in criminal matters. The purpose of this draft is to implement the principle of mutual recognition for a list of 32 offences (already agreed, based on a corresponding list adopted for the European Arrest Warrant). Among sticking points is the "territoriality clause," whereby a Member State could refuse to hand over evidence if it was related to an act that took place on its territory. The question is whether this right of refusal should exist independently or whether it can only be invoked if the executing country does not consider the act in question as a crime (principle of dual criminality). Member States were split down the middle on this question. Per request of EU leaders, this draft Framework Decision is supposed to be adopted by the end of 2005.

EUROPEAN ARREST WARRANT -----

17. The Council noted an evaluation by the Commission of the implementation of the European Arrest Warrant (EAW), which has now entered into force in all 25 Member States. The Council tasked the Commission to prepare another report by June 2006 on measures taken by the individual Member States to reinforce compliance of national legislation with the EU Framework Decision. EU sources said Italy - the last country to enact the warrant just a few weeks ago - called for the evaluation to be more statistical than political, thus not going into an assessment of why it took some Member States so long to implement the EAW.

MCKINLEY